BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LARRY D. HUTCHINSON	)	
Claimant	)	
	)	
VS.	)	Docket Nos. 1,033,518 &
	)	1,033,519
U.S.D. 259	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Claimant and respondent both requested review of the October 21, 2009, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Charles W. Hess, of Wichita, Kansas, appeared for claimant. Vincent A. Burnett, of Wichita, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) ordered respondent to furnish the names of three physicians for selection of one by claimant to treat his knee. By implication, the ALJ found that claimant's right knee injury was a natural and probable consequence of his work-related back injury. The ALJ further authorized Dr. Alan Moskowitz to continue to be claimant's treating physician for all treatment, tests and referrals. Dr. Pedro Murati was authorized to monitor claimant's medications. And respondent was ordered to reimburse claimant for prescription expenses as set out in claimant's exhibit to the preliminary hearing.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 20, 2009, Preliminary Hearing and the exhibits and the transcript of the December 18, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant requests the Board affirm the preliminary hearing Order. However, claimant also asks that the ALJ's ruling allowing into evidence results of a drug screen be reversed and the results of the drug screen be stricken from the record.

Respondent argues that claimant's need for medical treatment to his right knee as ordered by the ALJ did not arise out of and in the course of claimant's employment with respondent as a natural and probable consequence of his original injuries.

The issues for the Board's review are:

(1) Did claimant's need for the medical treatment to his right knee ordered by the ALJ arise out of and in the course of claimant's employment with respondent as a natural and probable consequence of his original injuries?

(2) Should the ALJ's ruling allowing into evidence results of a drug screen be reversed and the results of the drug screen stricken from the record?

FINDINGS OF FACT

Claimant worked for respondent as a roofing foreman. He suffered a work-related back injury on April 28, 2004, when he fell off a ladder. He suffered a second work-related back injury on February 5, 2007, when he slipped and fell while he was on a roof. Dr. Alan Moskowitz was authorized to be his treating physician for his back injuries, and on February 19, 2008, he performed surgery wherein he fused claimant's lumbar spine at L4-L5 and L5-S1. Since claimant's surgery, he has had physical therapy and is being treated with medication.

Claimant testified that since his surgery, his back bothers him and continually goes out on him. He said that he once fell getting out of the whirlpool bath and broke his arm, and he fell a second time going down a step, which caused him injuries that required stitches in his lip and eye.

On May 12, 2009, claimant went fishing with his grandson. He testified that he was walking along the water's edge when he attempted to step over a washout. He said his back went out on him, and he fell. He heard a pop in his right knee and was unable to stand on it. His grandson had to help him back to the car. Claimant went to the emergency room at Wesley Medical Center (Wesley) on May 14, 2009, where the records showed he reported that he had fallen into a hole and twisted his right knee. He complained of severe pain to his anterior knee radiating to his tibia. He was told he had a torn meniscus in his right knee and that it was dislocated.

Claimant went to the emergency room at Via Christi Regional Medical Center (Via Christi) on May 19, 2009. The Via Christi records show he told the emergency room personnel that he had fallen into a hole two weeks earlier and had injured his right knee.

Claimant testified that notwithstanding the history recorded on the emergency room records of Wesley and Via Christie, he did not fall into a hole but, instead, fell and twisted his leg trying to step over a hole. He testified that he told the emergency room personnel

at both hospitals about his back fusion. He also testified that he told the hospital personnel that his back was the reason for his knee injury and did not know why neither hospital's records mentioned his back going out as the reason for his fall.

Dr. Moskowitz referred claimant to Dr. Jon Parks for pain management. Claimant first saw a physician's assistant in Dr. Parks' office on June 26, 2009. In the history section of Dr. Parks' report of June 26, there is no mention of claimant's right knee injury, although claimant testified that he told the physician's assistant about his right knee incident. Further, there is no mention in claimant's history of his falling because his back gave out. The medical records from Dr. Parks' office for August 13, 2009, however, indicate that claimant was having more pain in his right knee. In that report, it also notes that claimant gave a history of a sharp pain in his low back which caused him to fall in either April or May 2009. Claimant told Dr. Parks' physician's assistant that a few days before the August 13 appointment, he again had a sharp pain that made him fall, and he reinjured his right knee.

At the preliminary hearing held October 20, 2009, respondent's attorney asked to enter as an exhibit the results of a drug test performed on claimant on June 26, 2009. Claimant's attorney objected to the introduction of the results of the drug test because the test did not satisfy the requirements of K.S.A. 2008 Supp. 44-501(d). The ALJ asked respondent's attorney if he was planning to use the results of the drug test to deny all liability on the claim, and respondent's attorney answered that he was not. Thereafter, the ALJ overruled the objection made by claimant's attorney.

During cross-examination, respondent's attorney asked claimant about testing positive for marijuana on the drug test. Claimant's attorney again objected to the use of the drug test. Claimant's attorney argued that respondent was attempting to use the document to deny claimant's workers compensation benefits and the document had not satisfied K.S.A. 2008 Supp. 44-501(d). Respondent's attorney again denied he was using the document to deny claimant's workers compensation benefits, and the ALJ allowed him to continue to ask claimant about the results of the drug test.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[1] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[2]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[3]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[4] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[5] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's

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[1] K.S.A. 2008 Supp. 44-501(a).

[2] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[3] *Id.* at 278.

[4] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[5] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

> disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[6] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber,*[7] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[8]

In *Logsdon*,[9] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

K.S.A. 44-501(d) states in part:

> (2) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or

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[6] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[7] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[8] *Id.* at 728.

[9] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006).

consumption of alcohol or any drugs, chemicals or any other compounds or substances, including but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens. In the case of drugs or medications which are available to the public without a prescription from a health care provider and prescription drugs or medications, compensation shall not be denied if the employee can show that such drugs or medications were being taken or used in therapeutic doses and there have been no prior incidences of the employee's impairment on the job as the result of the use of such drugs or medications within the previous 24 months. It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that at the time of the injury that the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:

Confirmatory test cutoff levels (ng/ml)

Marijuana metabolite 1.....15
Cocaine metabolite 2.....150
Opiates:
Morphine.....2000
Codeine.....2000
6-Acetylmorphine4.....10 ng/ml
Phencyclidine.....25
Amphetamines:
Amphetamine.....500
Methamphetamine 3.....500

1 Delta-9-tetrahydrocannabinol-9-carboxylic acid.
2 Benzoylecgonine.
3 Specimen must also contain amphetamine at a concentration greater than or equal to 200 ng/ml.
4 Test for 6-AM when morphine concentration exceeds 2,000 ng/ml.

. . . The results of a chemical test shall not be admissible evidence to prove impairment unless the following conditions were met:

(A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;

(B) the test sample was collected at a time contemporaneous with the events establishing probable cause;

(C) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;

(D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;

(E) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and

(F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.

(3) For purposes of satisfying the probable cause requirement of subsection (d)(2)(A) of this section, the employer shall be deemed to have met their burden of proof on this issue by establishing any of the following circumstances:

(A) The testing was done as a result of an employer mandated drug testing policy, in place in writing prior to the date of accident, requiring any worker to submit to testing for drugs or alcohol if they are involved in an accident which requires medical attention;

(B) the testing was done in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and was not at the direction of the employer; however, the request for GCMS testing for purposes of confirmation, required by subsection (d)(2)(E) of this section, may have been at the employer's request;

(C) the worker, prior to the date and time of the accident, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident requiring the worker to obtain medical treatment for the injuries suffered. If after suffering an accident requiring medical treatment, the worker refuses to submit to a chemical test for drugs or alcohol, this refusal shall be considered evidence of impairment, however, there must be evidence that the presumed impairment contributed to the accident as required by this section; or

(D) the testing was done as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post accident testing program and such required program was properly implemented at the time of testing.

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2008 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of

> whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,[10] the Kansas Court of Appeals stated:

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[11]

The parties may preserve an issue for final award as provided by K.S.A. 44-534a(a)(2), as amended. That statute provides in pertinent part:

> Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[13]

ANALYSIS

Claimant testified to several instances where his back went out and caused him to fall, including the event on May 12, 2009, when he injured his knee. His description of that

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[10] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[11] See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

[12] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[13] K.S.A. 2008 Supp. 44-555c(k).

event in his preliminary hearing testimony differs from the histories contained in the contemporaneous medical records in one significant detail, the cause of his fall. The history contained in certain medical records of stepping in a hole and falling omit any causal connection between claimant's back injury and his fall. Conversely, claimant's testimony directly attributes his fall to his back going out as he was attempting to step over a hole. This difference is critical to the determination of the compensability of the resulting knee injury. Claimant said he did not know why the medical histories did not mention his back going out on him and causing his fall.

Where there is conflicting evidence, as in this case, the credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant testify. The ALJ apparently found claimant's testimony credible because he awarded benefits. Generally, the Board gives some deference to an ALJ's determination of credibility where the ALJ had the opportunity to observe the witness' testimony. The undersigned Board Member, having read the evidentiary record, finds that it is appropriate to do so in this case and accepts claimant's testimony as true.

As claimant's knee injury resulted from a fall that was directly attributable to his work-related back injury, claimant's current knee condition and need for treatment is compensable.

The ALJ's evidentiary ruling on the admissibility of the drug test results was an interlocutory ruling that was within the ALJ's jurisdiction to decide. Furthermore, the ruling did not defeat claimant's claim. The Board is without jurisdiction to decide this issue on an appeal from a preliminary hearing.

CONCLUSION

(1) Claimant's accident on May 12, 2009, which resulted in an injury to his right knee, occurred as a direct and natural consequence of his original work-related back injury. As such, the accidental injury arose out of and in the course of his employment with respondent. The Board will follow the long line of Kansas appellate court precedents in this regard and does not interpret *Bergstrom*[14] to require a different result.

(2) The Board is without jurisdiction to decide the admissibility of the drug screen evidence at this juncture of the proceedings.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated October 21, 2009, is affirmed.

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[14] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

IT IS SO ORDERED.

Dated this _____ day of February, 2010.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Charles W. Hess, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge